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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 7551

THE REPORTER PUBLISHING COMPANY, INCORPORATED,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, The Reporter Publishing Company, Inc., by its attorney, James M. Barnes, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case of January 30th 1953.

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 10-17) is reported in 18 T.C. 86. The opinion of the Court of Appeals (R. 89-93) is reported in 201 F. 2d 743.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S. Code, Sec. 1254 (1). Jurisdiction of the United States Court of Appeals for the Tenth Circuit was based on Sec. 1141 (a), Internal Revenue Court, as amended by Sec. 36 of the Act of June 25th 1948 and that tax returns for the year involved were filed with the Collector of Internal Revenue for the District of Kansas at Wichita, Kansas, which Collector's office is within the jurisdiction of the United States Court of Appeals for the Tenth Circuit.

QUESTION PRESENTED

Whether taxpayer, a newspaper publisher holding an Associated Press membership, sustained a deductible loss under Sec. 23 (f) of the Internal Revenue Code, and Treasury Regulation 111, Sec. 29. 23 (e) - 3, by reason of a decision of the Supreme Court in Associated Press v. United States, 326 U.S. 1.

RELEVANT PARTS OF STATUTE INVOLVED

Internal Revenue Code; Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions;

* * * * * * * * * * * *

(f) *Losses by Corporations.*—In the case of a Corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * * * * * * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

* * * * * * * * * * * *

Sec. 29.23 (e)-3 *Loss of Useful Value* When, through some change in business conditions, the usefulness in the business of some or all of the assets is suddenly terminated,

so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in Section 113(b) and sections 29.113(a) (14-1 and 29.113(b) (1)-1) to 29.113(b) (3)-2, inclusive) and the salvage value of the property. *This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded*, as, for example, where an increase in the cost of change in the manufacture of any product makes it necessary to abandon such manufacture to which special machinery is exclusively devoted, or *where new legislation directly or indirectly make the continued profitable use of the property impossible.* This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income. The limitations provided in Section 117 with respect to the sale or exchange of capital assets have no application to losses due to the discarding of capital assets.

Sec. 29.23 (f) - 1 Losses by corporations - * * * *

The provisions of Sections 29.23 (e) - 1 to 29.23 (e) -5, inclusive, and Sec. 29.23 (i) - 1 are in general applicable to corporations as well as individuals. * * * * * * *

STATEMENT

The controversy involves the proper determination of the Petitioner's liability for Federal Income Taxes of $5,683.78

and Excess Profits Taxes of $3,570.07, for the fiscal year ending February 28th 1946. (R. 6-9).

The Petitioner on March 1st 1940, purchased the assets of the Independence Daily Reporter, a daily newspaper published in Independence, Kansas, at a total cost of $150,000. Since said date of March 1st 1940, to the present, the Petitioner has been engaged in the business of publishing a daily newspaper in such city. In order to finance the purchase, it was necessary to obtain part of the purchase price through a bond issue and one John H. Ruckman, a valuation engineer, was employed by the brokerage firm, Estes Snyder & Company, to place a valuation on the assets of the Independence Daily Reporter (R. 11).

One of the assets acquired by the Petitioner was membership in the Associated Press, sometimes herein referred to as A.P., which Ruckman valued at $70,735. This figure on review was revised by Ruckman's employer and established at $79,734.67. The petitioner opened its books on March 1st 1940 and valued the Associated Press membership at such figure of $79,734.67. The remaining assets making up the purchase price of $150,000 were entered on the Petitioner's books as follows: (R. 11-12)

Inventory of Ink, Metal and Job Supplies	$ 3,265.33
Land	8,000.00
Building	20,000.00
Equipment	39,000.00

The Associated Press is a cooperative non-profit association incorporated in the State of New York in 1900. It's business is the collection, assembly, exchange and distribution of news. At the time of the purchase on March 1st 1940 of an A.P. membership the Petitioner obtained, among other features, the sole and only right to receive in its community A.P. wire service. However the latter service was conditioned upon regular continuing payments therefore (R. 12). This latter feature was not paid for in the pur-

chase price for the assets of the Independence Daily Reporter. The Petitioner has separately paid A.P. for such service since March 1st 1940, at an annual average cost of approximately $3,622.27 on monthly statements. (R. 14).

Since 1900 and continuing to 1945, the exclusive feature of the A.P. membership gave the owner thereof exclusivity of A.P. membership in a particular territory as, without the consent of the Petitioner, no other newspaper in such territory could acquire such membership. (R. 13).

On June 18th 1945, the Supreme Court of the United States held in Associated Press v. United States, 326 U.S. 1, that certain A.P. by-laws relating to admission of new members competing with old members constituted unlawful restraints of trade under the Sherman Act. In effect, the Court held "the erection of obstacles to the acquisition of membership consequently can make it difficult, if not impossible, for non-members to get any of the news furnished by the Associated Press * * * * * ". This decision effectively wiped out one of the features of an A.P. membership to wit; the exclusivity of the news service in a particular territory. The Petitioner after June 18th 1945 no longer had the ability to exclude any other newspaper from obtaining in his community A.P. wire service and thereby more effectively competing with him. (R. 12-14).

Since the Petitioner acquired its newspaper on March 1st 1940, no other daily newspaper has been circulated in the Petitioner's territory. (R. 15). After the Supreme Court decision, the only value of the A.P. membership to the Petitioner was its ability, upon payment of regular fees, to receive A.P. wire service. Also, since the decision, any financially stable enterprise could enter the Independence territory and obtain A.P. wire service. Expert testimony uncontroverted by respondent confirms that an A.P. membership no longer is an asset upon the sale of a newspaper. (R. 34.44). A prospective purchaser can now acquire one directly from A.P. In fact the regular charges made by A.P.

for its service, absent the monopolistic exclusivity feature, negative any possibility that it could be such asset. (R. 29-30, 46-52).

In its income tax and excess profits tax returns for the fiscal year ended February 28th 1946, the Petitioner's accountant reduced the book value of the A.P. membership by $29,734.67. Such accountant, not being a lawyer, admitted he did not realize the legal implication of the Supreme Court decision or he would have taken the entire cost and reduced the membership value to zero. The Petitioner corrected such matter in the Tax Court by setting forth in its petition that the Supreme Court decision occasioned a loss to it of $79,734.67. The Commissioner of Internal Revenue, the Tax Court and the Court of Appeals also admitted that a loss was sustained but that such loss was a partial one and could only be ascertained if, as and when the newspaper was sold. (R. 16). The Commissioner of Internal Revenue disallowed the deduction claimed by the Petitioner and determined deficiencies in income and excess profits taxes for the fiscal year ended February 28th 1946. (R. 6-9). The Tax Court and the Court of Appeals sustained the Commissioners determination. (R. 17, 93).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing properly to interpret the decision of this Court in Associated Press v. United States, 326.U.S.1, and hold that the Petitioner sustained a deductible loss thereby.

2. In failing properly to interpret the decision of the Ninth Circuit in Consolidated Freight Lines, Inc., v. Commissioner of Internal Revenue, 101 F 2nd 813, and erroneously relying on it as support for the present decision.

3. In failing to hold that prior to this Court's decision in the Associated Press case an A.P. membership had separable

and severable features and that one of them was wholly lost as a result of such decision.

4. In failing to hold that an asset made nonexistent and illegal by operation of law cannot be the subject of a sale and is consequently a realizable loss capable of being determined at the time it becomes nonexistent and illegal.

5. In failing to place a value on that part of the assets admitted by the Court to have been lost as a result of the A.P. decision or, in the alternative, to order the Commissioner of Internal Revenue to make such valuation and allow same as a deductible loss.

6. In affirming the order of the Tax Court of the United States.

REASONS FOR GRANTING THE WRIT

The decision in this case will effect a very substantial segment (perhaps a majority) of the newspapers published in the United States i.e. those holding AP memberships prior to this Court's 1945 decision in United States v. Associated Press, 326 U.S.1. It involves an important question of law which has not been, but should be, settled by this Court. Among other things it queries whether a decision of this Court has such finality as will meet the requirements of Internal Revenue law and whether an asset this Court has ruled illegal can be the subject of a sale?

There is a clear conflict in principle, if not in decision, between the ruling of the Court below in the instant case, and the long chain of decisions following the Second Circuit in Cohan v. Commissioner of Internal Revenue, 39 F 2nd 540; and with the decision of the Eighth Circuit in Rugel v. Commissioner of Internal Revenue, 127 F 2nd 393. Additionally the instant case is in further conflict with Tax Court directions enunciated in Solt v. Commissioner of Internal

Revenue 19 T.C. No. 27, and Abraham v. Commissioner of Internal Revenue 9 T.C. 222.

In the Cohan case the Board of Tax Appeals admitted the questioned item was, in principle deductible, but because it could not definitely be ascertained refused to allow a deduction. The appellate tribunal, relying on the admitted deductibility, discarded the argument of lack of definite ascertainment and said:

> "The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; * * * *but to allow nothing at all appears to us inconsistent with saying that something was spent* * * * but there was basis for some allowance, and it *was wrong to refuse any* * * *. It is not fatal that the result will inevitably be speculative; *many important decisions* must be such." (Italics supplied).

Like the Cohan case, all lower forums in the instant case, admitted *there was a loss* (a deductible item, in principle) by reason of the AP decision, but refused to allow same because it was not capable of being definitely ascertained, absent a sale. This Court's AP decision was not, as the lower Court held by inference, "some definitely identifiable event" sufficient to destroy the asset claimed as a deduction, nor was it "—a closed transaction during the taxable year —." (R. 91-92). The petitioner maintains there is nothing more final and identifiable than a decision of this Court, nor is there anything that can more destroy an asset than this Court's ruling such asset is illegal. A decision of this Court definitely closes a transaction as there can be no further appeal.

In the Rugel case (supra) the Court affirmed the principle laid down in the Cohan case that *some allowance* must be made to a taxpayer where it has been established that the particular item is deductible, or that there was an admitted

loss. In the instant case all lower forums admitted the petitioner had sustained a loss but, nonetheless, refused to allow any deduction. The Eighth Circuit could not subscribe to such principle but stated that it would sustain a lower forum *only if some amount* was allowed.

> "If the evidence is convincing that *expenditures have thus been made*, but the taxpayer is able to furnish only general proof of their nature and details, the Board should consider all the evidence in the light of its general experience and *make such allowance for the sums expended* as it conscientiously feels would represent fair and reasonable expenses for such ordinary and necessary purposes in the circumstances of the taxpayer's business. Where this has been done, the Circuit Court of Appeals has no right to substitute its judgment for that of the Board of Tax Appeals. It is only *where the Board has acted arbitrarily and without regard for the evidence that the Court may interfere in such a situation.*" (italics supplied).

In the Solt case (supra) the petitioner lost certain improved realty through confiscation by the Red Government of Hungary, but his testimony according to the Tax Court showed "petitioner obviously knew very little about values; - - -," and "did not even understand what was meant by 'value' - - - ." Nonetheless the Court went on to say:

> "In the circumstances, we are without any reliable guides for determining petitioner's basis. The burden was on him, and he has failed to meet it. Yet, we are satisfied on this record that *he in fact did sustain a loss*, and that there was in fact some adjusted basis as of June 5th, 1942. In the circumstances, *we cannot deny him relief altogether*, cf. Helvering v. Taylor, 293 U.S. 507, and it is incumbent upon us to do the best we can with the materials at hand." (Italics supplied).

The petitioner in the Abraham case (supra) lost, through the German occupation of France, certain improved realty and personal property therein. He regained the realty and

found the greater part of the personal property gone. He did not know when it had been seized or destroyed. He had no facts to set the time, nor the amount, of the loss. Like our present case, a loss was admitted, but unlike it, the Court granted Abraham relief by saying:

> "Are we to deny him any loss because we cannot determine the amount of the loss with satisfactory accuracy which we would like? We think not. It seems to us that under the facts of the instant case we should apply the doctrine announced by the Court in Cohan v. Commissioner, 39 Fed. (2d) 540, and make the best approximation of petitioner's loss than we can under the evidence."

In the instant case the Tenth Circuit cited as lone support for its decision, Consolidated Freight Lines, Inc., v. Commissioner, 9 Cir., 101 Fed. 2nd. 813. Your petitioner respectfully represents this to be clearly erroneous as the Ninth Circuit specifically said *no question of monopoly was involved* and that the petitioner *suffered no loss* on the certificates.

> "The certificates issued under the 1921 act conferred no monopoly. The language of the certificates, so far as is here material, simply state that the applicant 'is hereby authorized to furnish' a particular kind of service. No statement was contained therein that a monopoly was thus granted for such particular service. * * * Destruction of the statute which put an end to the monopoly did not destroy the certificates, nor their value. * * * Whatever right the statute conferred on petitioner was subject to the right of the state to change it. When petitioner purchased the certificates, *it did not purchase a monopoly*, but the means by which it might take advantage of a monopoly conferred by statute. It now has no loss of such means for they exist now as before. We think *petitioner suffered no loss* on the certificates, *for the thing destroyed was not a part thereof*" (italics supplied.)

In our case it is palpably indisputable that a monopo was conferred and was part of the AP membership, or ce tificate, purchased by the petitioner. It was admitted l the lower Court that "the holder thereof may no longer pr vent a competitor from having such a membership." (R 9 Such Court also said "it may be conceded that the decisi by the Supreme Court effected a diminution in value of t Associated Press membership." (R. 91).

The lower Court, in our case, *greviously and in trag error misquoted the Ninth Circuit* by saying the latter ha concluded that "the destruction of the monopoly resulte only in a diminution of value of the certificate is equall applicable here" (R. 93). As above noted more in deta the Ninth Circuit actually held petitioner "did *not* purcha a monopoly" and "suffered *no loss* on the certificates, fo the thing destroyed was *not* a part thereof." (Italics su plied.) By inference, if the thing destroyed had been a pa thereof (the certificate) the Ninth Circuit would hav allowed petitioner a loss.

Petitioner now comes to the point whether the form "monopoly feature" of an AP membership was such a asset as could not be separated and severed from the oth assets of an AP membership. To propound that questio in the light of this Court's decision is its own best answe If it could not be so severed and separated then the who organization of the Associated Press would have ended o October 8th 1945. That it did not so end is self-evide history.

Accordingly what this Court declared illegal, and ther fore nonexistent, is separable and severable from the oth features of an AP membership. If that is so it must l capable of being valued, even though arbitrarily, a allowed as a deduction to the petitioner. The loss is dete minable as to some identifiable event because this Court AP decision, final as it is, can be identified as to time a occurrence. In what amount it should be allowed is not

the essence as long as the admitted loss is *allowed in some amount* (the *Cohan* case, *supra*, and its long chain of legal progeny.) It must be here reiterated that the respondent failed to introduce a single bit of evidence controverting petitioner's showing of the worthlessness, after the AP decision, of such a membership (R. 34, 43-44). Conceding the petitioner still uses the service of AP it must be recognized he pays separately for that. The furnishing of such service was not included in what petitioner paid $79,734.67 for (R. 13, 32). Even assuming, as did the lower Court, that an AP membership may be of some use to petitioner, the value thereof is purely nominal when compared with its original cost to petitioner. In all fairness and justice some allowance for that should be accorded the petitioner.

Your petitioner will not encumber the record with decisions to prove what is self-evident, namely that an asset made illegally by decision of this Court could not be required to be sold nor could it even have the possibility of sale. Therefore, it must be valued by some other means, arbitrarily if need be, *but it must be valued.*

On the assumption this asset, ruled illegal, must be valued there remains only the question when same shall be taken to constitute a legal deduction. On this point your petitioner found but one citation apparently on all fours, *Columbia Rivers Packers Association* v. *Commissioner*, CCH Dec. 12 554-J.

> "Where legislation was passed in 1934 (and its validity sustained in 1935) which prohibited the use of certain fishing equipment and it thereby became unprofitable for taxpayer to carry on fishing operations on leased grounds, the value of the lease was extinguished in 1934 and no loss was sustained in 1937 when the lease expired."

Arguendo the requirement that before one can take a loss on an asset there must be a sale or abandonment is generally a reasonable one. It is, in most cases, the only way the

amount of the actual loss can be determined. It must, therefore, be that such requirement is solely for the purpose of fixing the amount of the loss. Reasonably, this doctrine is inapplicable if the actual loss is recognizable and determinable without the necessity of a sale. In the instant case the asset (the monopolistic exclusivity feature) became illegal and nonexistent immediately upon the decision of this Court in *Associated Press* v. *United States* (*supra*). As an illegal or nonexistent thing it cannot be sold and a sale must necessarily not be a requirement to determine the amount of the loss. No subsequent action could render the monopoly feature of the AP membership any the less worthless than did the decision of this Court. That being so, it would appear mandatory for the petitioner to deduct in the year of the decision the value of the asset which was made illegal and nonexistent by such decision.

To summarize the basic reasons why a writ should be issued herein the petitioner states:

1. The decision of the lower Court herein conflicts in principle with the Second Circuit in *Cohan* v. *Commissioner of Internal Revenue* (*supra*), the Eighth Circuit in *Rugel* v. *Commissioner of Internal Revenue* (*supra*), the later Tax Court cases of *Solt* (1952) and *Abraham* (both *supra*), and erroneously interprets the decision of the Ninth Circuit in *Consolidated Freight Lines, Inc.*, v. *Commissioner of Internal Revenue* (*supra*).

2. The lower Court's decision herein is on an important question of Internal Revenue law vitally affecting hundreds of newspapers in the United States, and which question has not been, but should be, settled by this Court.

3. The lower Court's decision herein is probably in conflict with this Court's decision in *Associated Press* v. *United States* (*supra*) insofar as such lower Court so interpreted it herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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